

Analysis of Alternative Processes for EPA to Review and Approve States' UIC Program Revisions

EPA commitment per GAO Drinking Water Report GAO-14-555

Overview

The Government Accountability Office examined EPA's oversight and enforcement of the Underground Injection Control Class II program and published its conclusions and recommendations in its Final Report: GAO-14-555, "DRINKING WATER: EPA Program to Protect Underground Sources from Injection of Fluids from Oil and Gas Production Needs Improvement" (June 27, 2014).

GAO recommended that the Administrator of the Environmental Protection Agency take four actions to ensure that EPA's oversight of the Class II program is effective in protecting drinking water sources from the underground injection of large amounts of wastewater that will be produced with increasing domestic oil and gas production. One of these recommendations was intended to ensure that EPA maintains enforcement authority of state program requirements. Many state program changes have not been approved by EPA, are not incorporated into federal regulations, and are thus not federally enforceable. Thus, GAO recommended that EPA "evaluate and consider alternative processes to more efficiently incorporate future changes to state program requirements into federal regulations without a rulemaking," since the rulemaking process required for each state program change can be lengthy and resource-intensive.

In response to GAO's recommendation, EPA agreed that its Offices of Water, General Counsel and Enforcement and Compliance Assurance, and regional counterparts would explore alternative methods for maintaining federal enforceability under current statutory provisions. EPA committed to develop an options paper identifying alternative approaches and processes required to implement those approaches, if any. This document is the result of that analysis and completes EPA's commitment in response to GAO's recommendation.

Summary of Analysis and Conclusion

To determine whether EPA could incorporate future changes to state program requirements into federal regulations without a rulemaking, EPA analyzed the relevant provisions in the Safe Drinking Water Act and UIC regulations, considered a regulatory and a non-regulatory approach, evaluated how a legally sound approach might be implemented, and reviewed programmatic impacts. Based on this analysis, EPA concludes that it is not a viable alternative for the Agency to revise its existing regulations to remove the rulemaking procedures for approval of substantial state-initiated program revisions, or to remove the requirement that all state program revisions be codified to be federally enforceable.

Given the specific statutory constraints in the UIC program, removing the codification requirement would create uncertainty for EPA, states and the regulated community about the

applicable legal requirements. For example, one of the options considered was for EPA to use a website, in lieu of the *Code of Federal Regulations*, for providing notice of the applicable legal requirements. Even in this case, it is unclear whether EPA would be able to successfully enforce state programs referenced on a website as opposed to the CFR. Therefore, because EPA has not found a suitable alternative under the current statute, EPA will continue to follow its current process of reviewing state program revisions, approving substantial state program revisions by rule, and codifying state UIC program revisions in the CFR. EPA will continue to look for ways to make the current process more efficient by prioritizing state codifications and improving and sharing standard operating procedures, templates, forms, and training materials across EPA.

Discussion of Relevant Safe Drinking Water Act and UIC Regulatory Provisions

The Safe Drinking Water Act provides that the state UIC programs,¹ and any revisions to such programs made in response to a change in EPA UIC regulations, must be approved “by rule.” See SDWA 1422(b)(1)(B)(2). Moreover, EPA’s UIC enforcement authority extends only to requirements of an “applicable underground injection control program”, see SDWA Section 1423(a)(1). An applicable program is defined as the state program approved by EPA rule. See SDWA Section 1422(d).

Thus, under the SDWA, EPA cannot enforce *federal* UIC requirements in a primacy state, but rather can only enforce the *state program EPA approved*. This holds true even if the state’s requirements are different from the federal requirements and even if the state or the federal requirements have changed since state program approval. This scenario is unlike the public water system regulatory program in SDWA. For the public water system program, SDWA authorizes enforcement of *either federal or approved state requirements*, see SDWA section 1414(i). As a result, in the UIC program, it is particularly important that the approved state program is clear to EPA, states and the regulated community.

EPA has implemented the UIC statutory provisions by promulgating regulations requiring approval of what EPA considers “substantial” program revisions through rulemaking procedures. The UIC regulations also, in effect, require codification of all approved program revisions (both “substantial” and “non-substantial”) in 40 CFR Part 147. Specifically, EPA’s regulations at 40 CFR 147.1(a) provide that “applicable” UIC programs for states are set forth in Part 147. EPA’s regulations at 40 CFR 147.1(e) provide that those state UIC program requirements codified in Part 147 are enforceable by EPA. Thus, although EPA regulations authorize approval of “non-substantial” program revisions by letter, such program approvals are not federally enforceable unless they are codified in 40 CFR Part 147.

¹ A state’s UIC program consists of their statutes and UIC regulations, Governor’s Letter, Attorney General’s Statement, program description, Memorandum of Understanding between the EPA Region and the state, and any Memoranda of Understanding among the state agencies that will implement the state’s UIC program.

Legal and Programmatic Analysis:

To fulfill EPA's commitment in response to GAO's recommendation, EPA's Offices of Water, General Counsel, and Enforcement and Compliance Assurance and regional counterparts evaluated SDWA's provisions and EPA's UIC regulations to identify alternative ways for EPA to review and approve state UIC program revisions *and* maintain federal enforceability. Based on this analysis, EPA was unable to identify a viable, more efficient process to review and approve state program changes, consistent with statute and regulations, and still maintain federal enforceability of the state UIC programs. The following paragraphs discuss EPA's analysis and conclusion.

Alternatives Considered and Evaluation

#1: Considered all state-initiated program revisions to be non-substantial, and approved such revisions by letter (i.e., without a rulemaking)

EPA first considered whether its existing regulations would allow it to maintain federal enforceability over revised state program requirements without rulemaking – and concluded that they would not. First, SDWA requires certain state program revisions (i.e., those made in response to a change in EPA UIC regulations) to be made by rule². As a result, only a subset of state program revisions, i.e. those that are state-initiated, are considered in this alternatives analysis. Regardless of the determination in this analysis, without a statutory change, those other revisions would need approval by rulemaking procedures to be federally enforceable. Second, although the existing regulations allow approval of what EPA considers “non-substantial” state program revisions by letter, EPA regulations currently still require such approved changes to be codified in Part 147 in order to be “applicable” and thus federally enforceable under the statute. Therefore, even if EPA considered all state-initiated program revisions to be non-substantial, and approved such revisions by letter, these revisions would not be federally enforceable unless they are codified in 40 CFR Part 147. Therefore, this non-regulatory approach would not address GAO's concern because approval by letter, although less burdensome, remains insufficient to establish EPA enforcement authority over these state programs.

#2: Conduct a rulemaking to allow EPA to approve all state-initiated program revisions by letter, and allow for federal enforcement of state revisions without codification.

EPA also considered whether to conduct a rulemaking to (1) revise its UIC regulations to remove the requirement that substantial state-initiated program revisions be approved through rulemaking procedures (40 CFR 145.32) and (2) remove the requirement that such approvals be codified in 40 CFR Part 147 to be applicable and thus federally enforceable (40 CFR 147.1(a) and (e)). The first change would allow EPA to approve all state-initiated UIC program revisions by letter, and the second would allow for federal enforcement of state revisions without codification.

² SDWA §1422 requires state UIC programs, and any revisions to such programs made in response to revised EPA UIC regulations, must be approved “by rule.”

For this removal of the codification requirement to be a viable option to allow federal enforcement, EPA would also need to add regulatory language to 40 CFR Parts 145 and 147 to identify where to find the applicable state UIC program requirements (for example, on EPA's website) and to clarify that these state programs are federally enforceable even though EPA no longer publishes them in 40 CFR Part 147. One way to do this would be to set up a website and publish the state UIC programs on this website. EPA would then "transfer" all of the applicable state programs currently published in 40 CFR Part 147 to this new website, and publish any new state-initiated applicable program revisions on the website. There are several challenges to this approach:

a. Public and regulated community still need a notification of the change and where to find the approved regulation, if not in the Federal Register and CFR.

EPA determined that a key challenge posed by this alternative is ensuring that the public and regulated entities are aware that EPA has approved a state program revision and that this information is clearly documented and readily available. If EPA has approved a state revision without rulemaking procedures and it has not been codified, it would no longer be published in the *Federal Register* or in the CFR. As mentioned earlier, EPA could publish these approval letters on a website. However, EPA would also need to notify the public and regulated entities that EPA has approved the revisions and that the revisions and approval documentation are located on the website. This would still require resources and, without formal documentation in the CFR or *Federal Register*, may be insufficient to ensure regulated entities are appropriately aware of it in the future.

b. It is uncertain whether state regulations identified in a website (as opposed to the CFR) may be federally enforceable.

A second challenge to this approach is that bringing a federal action to enforce a state UIC requirement that is published on a federal website but not in the CFR is legally untested. For example, it is uncertain whether a website provides sufficient fair notice of applicable legal requirements. It is also uncertain whether a court would accept citations to a website as the official compilation of federally-enforceable state requirements instead of the CFR. As a result, it is unclear whether EPA could successfully bring an enforcement action based on requirements provided only on a website.

c. This approach does not alleviate the resource burden, as EPA still needs to review state regulations (existing and all changes since primacy), work with states to make any additional changes needed for approval, invite public participation, and create and keep website updated with state regulatory changes.

GAO, in their report, notes the significant resource burden to EPA of ongoing rulemakings to ensure federal enforceability of state UIC programs. However, publishing state program revisions on the website instead of codifying these revisions may not alleviate the resource burden needed to maintain federal enforceability. Reviewing the state revisions and ensuring compatibility with SDWA and UIC regulations still requires personnel and financial resources. During this review, EPA reviews and evaluates all

regulations, including those approved at the time of primacy and state-initiated regulatory changes that have been made since previous approvals and codifications. If any regulation is not deemed effective at protecting USDWs, the state must make the changes to its regulations needed for EPA approval to continue the process.

Even with removal of the rulemaking and codification requirements, resources would still be necessary to manage public participation in EPA's approval process. Although the Agency would no longer be compelled by law to maintain public participation, for purposes of transparency, it is EPA's preference to invite such participation in and collaboration on our actions in meeting the Agency's mission. Further, creating, populating, and maintaining this website with all of the state UIC programs and any subsequent revisions would also be resource intensive for EPA.

d. Submitting regulatory revisions and going through the process of obtaining EPA approval is resource-intensive for states as well.

A significant burden of the EPA review and approval process also falls on states that must prepare the paperwork to submit state-initiated revisions to EPA and in making any changes to the state regulations in response to EPA's review.

Conclusion

EPA determined that its existing regulations do not allow the Agency to maintain federal enforceability over revised state program requirements without a rulemaking. However changing the UIC regulations to allow EPA to enforce changes to state provisions without a rulemaking would create uncertainty with respect to federal enforcement and is unlikely to significantly relieve the resource burden to EPA and the states. Therefore, EPA will continue to follow its current process of reviewing state program revisions as we receive them for approval, approving substantial state program revisions by rule, and codifying applicable state UIC program revisions in the CFR. The Agency will continue looking for ways to make the current process more efficient by prioritizing state revision codifications and improving and sharing standard operating procedures, templates, forms, and training materials across EPA.